

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1976

No. 76-818

R. D. FITCH, ET AL,

Appellants,

vs.

HIJINIO SILVA, ET AL,

Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF TEXAS**

JURISDICTIONAL STATEMENT

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IN THE
Supreme Court Of The United States

OCTOBER TERM, 1976

No.

R. D. FITCH, Individully and in His
Official Capacity as Frio County,
Texas, County Judge; WILLIAM A. BOYD,
JAMES C. STACY, and OWEN LESTER,
Individually and in Their
Official Capacities as County Commissioners
of Frio County, Texas; MONA HOYLE,
Individually and in Her Official Capacity as
Frio County, Texas, County Clerk;
BENNY C. SANDERS, Individually and in
His Official Capacity as Sheriff of
Frio County, Texas; YANCEY BARNHART,
Individually and in His Official Capacity as
Democratic Party Chairman of Frio County,
Texas; and FRIO COUNTY, TEXAS,

Appellants,

vs.

HIJINIO SILVA, CARMELINA TREVINO,
ARNALDO HERNANDEZ, MODESTA SALAZAR,
ANITA GARZA, NOEL PEREZ and
RUDY GONZALES,

Appellees.

**APPEAL FROM THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
DISTRICT COURT**

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of
the Supreme Court of the United States, appellants,
R. D. Fitch, William A. Boyd, James C. Stacy, Owen
Lester, Mona Hoyle, Benny C. Sanders, Yancey Barn-
hart, and Frio County, Texas, file this statement of

the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the Judgement and Orders entered by the three judge court of the United States District Court for the Western District of Texas in this case and should exercise such jurisdiction herein.

OPINION BELOW

No opinion has been either filed or published by the Court in this case up to this time.

GROUND OF JURISDICTION OF SUPREME COURT

This appeal arises from an action to enjoin appellants, as defendants, from holding elections under an apportionment plan alleged to be in violation of the Voting Rights Act of 1965, as amended, which turned into a reapportionment proceeding by virtue of the entry of a "consent" order of reapportionment without the actual consent of the defendants and without a trial of any kind on the issue of reapportionment. The judgment of the United States District Court was entered on October 5, 1976. A timely notice of appeal was filed on October 22, 1976, in the United States District Court for the Western District of Texas. The jurisdiction of this Court is invoked under the specific provisions of Title 42, United States Code, Section 1973c, last sentence.

QUESTION PRESENTED

Whether the court below properly reinstated a so-called consent order of reapportionment after having vacated same by order dated August 5, 1976 under Rule 60b, F.R.C.P. for lack of consent by defendants, and in finding that such order was entered into vol-

untarily, thereby denying defendants a trial of any kind on the merits? This is a due process case.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows: The Commissioners' Court of Frio County adopted a reapportionment plan on August 16, 1973, (some two years before Texas came under the Voting Rights Act). This plan was not precleared by the Justice Department pursuant to Section 5 of the act. On April 22, 1976, prior to the Texas primary elections scheduled for May 1, 1976, appellees, as plaintiffs, brought suit for temporary injunctive relief to block the holding of such primary election as to precinct offices, which relief was granted.

The suit was not only brought against the county, the county judge, and the four county commissioners, but also against the sheriff, the court clerk, and the county chairman of both the Democratic and Raza Unida parties.

While the suit was pending untried, and before any kind of hearing had been held before the court of three judges which had been convened, the special attorney for the county and the Commissioners' Court entered into an "agreed settlement" with the attorneys for the plaintiffs (as of May 31, 1976) which was signed as an order and final judgment by the three judges on July 6, 1976 nunc pro tunc June 28, 1976.

The plan incorporated in such order had been approved by a three to two vote of the Commissioners' Court on May 27, 1976. Commissioner Stacy voted against the plan and Commissioner Lester abstained. These two defendants individually never agreed to the "consent" order. The defendants Hoyle (County

Clerk), Sanders (Sheriff) and Barnhart (Democratic County Chairman) have never to this day agreed to it nor were they offered a chance to assent or object thereto by the said special attorney for the county (Craig L. Austin). Two of these defendants, Sanders and Barnhart, were not even present at the May 27th meeting at which the settlement was made. Attorney Austin was not employed to represent any of these last named three defendants, as shown by the minutes of the Commissioners' Court. Nor did he represent Gonzales, the Raza Unida Chairman, who was totally inactive herein ("he defaulted" as Attorney Austin himself testified) until he and Commissioner Perez appeared at the only three judge court hearing in this case held at Austin, Texas on September 2, 1976. Gonzales and Perez then appeared with personal attorneys and had themselves realigned as plaintiffs. Their only "contribution" to the trial was to get a judgment for their attorney fees.

Meanwhile, on July 6, 1976 the Commissioners' Court of Frio County unanimously voted to discharge Mr. Austin as their attorney and to employ their present counsel to file a motion seeking to vacate the "consent" order of July 6, 1976 nunc pro tunc June 28, 1976.

Such a motion, supported by fourteen affidavits, was filed on July 14, 1976 and on August 5, 1976 the three judge court, without hearing, entered its order vacating said "consent" order under Rule 60b, F.R.C.P.

Plaintiffs sought and obtained (after a hearing on August 13, 1976) from the single judge a continuation of the temporary injunction pending a hearing before the three judge court. Such three judge hearing was held on September 2nd as set out above.

At said hearing of September 2, 1976 defendants County Judge Fitch and Commissioner Boyd testified that the only reason they had voted for the settlement plan was because their then attorney represented to them that if they did not do so the county could not be reapportioned under any circumstances until after the federal census of 1980 (which is admittedly not legally true). Such testimony was verified by the testimony of the defendants Stacy, Lester and Hoyle and even the Attorney Austin testified that these defendants "could have drawn (such) conclusion from my advice, and probably did draw (such) conclusion . . ."

The evidence adduced at said hearing also reflects that the former attorney for the county materially misrepresented the case of *Beer v. U.S.*, (47 L.Ed.2d 629; 96 S.Ct. 1357) to his clients. Further, the uncontradicted testimony of Tax Assessor Collector Nations showed that the rejected reapportionment plan of 1973 provided a clear majority of registered voters of Mexican ancestry in three out of the four Commissioners' precincts of the county. The 1970 census showed the Mexican American population of the county to be less than 70%.

The **only** evidence controverting any of these facts came from the testimony of the former special attorney for the defendants, Craig L. Austin, and his testimony actually corroborates most of such facts when his equivocations and self-serving conclusions are taken into account.

FEDERAL QUESTION IS SUBSTANTIAL

This appeal presents a federal question which is **not** only substantial but fundamental in that what is involved is the constitutional right to due process of law.

We think it goes without saying that a final judgment entered against a number of defendants without a trial on the merits (and without default on their part) in the guise of a consent decree when in fact one or more of such defendants have not actually consented thereto is as plain (and serious) a violation of constitutional law as could be imagined.

In the case of *In Re Railroad Co. of New Jersey*, 136 F.2d 633, the Third Circuit enunciated the fundamental principle spoken of above:

"The right to notice and a hearing is one of ancient origin and by the due process clauses of the 5th and 14th amendments has been safeguarded to all against deprivation by the federal government and the states, respectively. The fact that the state had notice and appeared is not sufficient to satisfy the requirement of due process. It must also have been afforded an opportunity to be heard . . ."

The Court cited the 1665 English case of the Protector and the Town of Colchester, 82 Eng. Repr. 850 by Chief Justice Roll. See footnote, page 639.

That there has been no hearing in this case on the merits of the reapportionment of Frio County, either as to the 1973 plan or as to the plan contained in the so-called agreed order, or as to any other plan, is beyond dispute.

The only question left for decision is as to whether or not every defendant in this case consented to the agreed order of June 28, 1976 incorporating the reapportionment scheme now in effect.

It is beyond dispute that none of the defendants signed said order or that any of them directly assented thereto. The only attorney signing said order (oth-

er than plaintiff's attorney) was Craig L. Austin, the attorney employed by the Commissioners' Court to represent Frio County. Mr. Austin, in signing said order, clearly did not do so as the attorney for the defendants Hoyle, Sanders and Barnhart and the then defendant Gonzales. Nor for Commissioners Stacy and Lester as individuals and individual Commissioners, for they did not vote for the plan incorporated in the order.

The evidence further shows that Commissioner Perez (now realigned as a plaintiff) had told Attorney Austin that he did not represent him, and further, that Austin had told defendant Hoyle that he didn't represent her.

Finally, the defendants County Judge Fitch and Commissioner Boyd did vote for the plan (with Perez) but as they have shown in their several affidavits, and in giving testimony *viva voce* at the only three judge court hearing of September 2, 1976, they did so only because of representations made by their attorney that if they did not agree thereto that the County could not be reapportioned until sometime after the completion of the 1980 decennial census and that they could not win the case in any event because of the holding of this Court in the *Beer* case, which decision he misrepresented to them as conclusively proven by his letter of June 7, 1976 to Editor Reddell. To counter this the plaintiffs have contended that all of the parties except the county and the members of the Commissioners' Court were nominal parties. These other defendants, however, were not sued as nominal parties (all are on the County Election Board by law) and a review of the agreed order of June 28, 1976 will reveal that all of them were fully bound thereby as de-

fendants, individually as well as collectively.

The single judge court has sought to support the reinstitution of the "consent" order by adjudging the attorney fees solely against the defendant county. See order of October 4, 1976 and judgment of October 5, 1976. The individual defendants remain liable for court costs and to citation for contempt in the event the judgment is violated, regardless of by whom.

It is important to bear in mind that the three judge court vacated the agreed judgment or "consent" order by its order of August 5, 1976, filed August 9, 1976, reciting that it was "... not agreed to by many of the defendants and is therefore void ..."

The recited fact remains true today. It was based on fourteen affidavits which have not been controverted. The court abused its discretion and denied many (if not all) of the defendants of their basic constitutional right to due process of law by reversing its decision on the basis of the evidence at the September 2nd hearing.

In its new order the three judge court found (Finding of Fact No. 2, order of September 26, 1976) that

"The Agreed Settlement ... was entered into by the defendants (meaning **all** of them) voluntarily and not as a result of fraud or compulsion."

This finding is baseless because there has never been any claim on the part of the defendants Hoyle, Sanders, Barnhart, Stacy and Lester that they were forced or defrauded into agreement. The simple fact is that they claim (and the record completely supports them) that they never agreed to it all.

We attach hereto for the convenience of the Court

in a special appendix a list of references to the transcript of testimony of the September 2nd hearing before the three judge court which we believe particularly substantiates appellants' contentions. This transcript has been designated as part of the record.

Attorney Austin did not represent the first three defendants named above and none of these five were asked by him for authority to agree to it in their behalf, nor did they authorize him to agree to this settlement. The last two named defendants either voted against the settlement or refused to vote for it as a matter of uncontroverted official public record (Minutes of the Commissioners' Court meeting of May 27, 1976).

Only two of the present defendants, Fitch and Boyd, actually agreed to the consent order and claim (in effect) that they felt compelled or defrauded into doing so. Therefore, only two out of the original nine individual defendants (of whom seven are still bound by final judgment as individual defendants) assented to it on any basis.

An anomaly of the court's action is that Commissioner Perez, an indispensable party defendant as a member of the Commissioners' Court (if any individual is) has been permitted to become a plaintiff against the County and Commissioners' Court he is supposed to serve and the judgment now does not bind him even as a member of the court!

We can think of nothing as substantial under federal law as assuring to every American the two basic elements of due process, notice and hearing before judgment. The actual judgment here is the so-called "consent" order and its entry was without the actual consent of many defendants. That there was

no hearing on the merits is undisputed.

To countenance such a denial of fundamental constitutional right for the sake of expediency or to exemplify a zeal for civil rights would be nothing less than abhorrent.

The oppressive possibilities of the so-called "agreed judgment" as a device for adjudicating conceived concepts of punitive "affirmative action" without the embarrassment of actual trial of the issues is tremendous.

To brush off such a constitutional threat by referring to parties as "nominal" and by circumscribing their liability to that on the main issue merely aggravates the danger by introducing insidious rationalizations into a practice which is totally wrong at the bedrock of Anglo American constitutional law.

CONCLUSION

For the reasons stated above, appellants submit that this appeal brings before the court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution, and that the court should take jurisdiction of this appeal.

Dated December, 13, 1976.

Respectfully submitted,

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Attorney For Appellants

Of Counsel:
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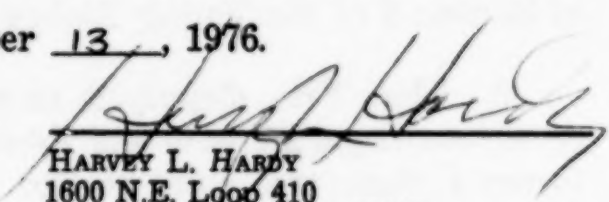
PROOF OF SERVICE

I, Harvey L. Hardy, a member of the Bar of the Supreme Court of the United States and counsel of record for R. D. Fitch, William A. Boyd, James C. Stacy, Owen Lester, Mona Hoyle, Benny C. Sanders, Yancey Barnhart, and Frio County, Texas, appellants herein, hereby certify that on December , 1976 pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Jurisdictional Statement on each of the parties herein as follows:

On Hijinio Silva, Carmelina Trevino, Arnaldo Hernandez, Modesta Salazar, Anita Garza, Rudy Gonzales, and Noel Perez, appellees herein, by depositing such copies in the United States Post Office, San Antonio, Texas, with first class postage prepaid, properly addressed to the post office address of Mr. Albert H. Kauffman, the above named Hijino Silva, Carmelina Trevino, Arnaldo Hernandez, Modesta Salazar and Anita Garza's counsel of record at 501 Petroleum Commerce Building, 201 N. St. Mary's Street, San Antonio, Texas 78205, and to Mr. Luis M. Segura, the above named Noel Perez's counsel of record, at 523 South Main, San Antonio, Texas, and to Mr. George J. Korbel, the above named Rudy Gonzales' counsel of record, at Apt. 1801, 7200 S. Presa, San Antonio, Texas.

All parties required to be served have been served.

Dated December 13, 1976.


HARVEY L. HARDY
1600 N.E. Loop 410
San Antonio, Texas 78209

APPENDIX A

JUDGMENT OF THE U.S. DISTRICT COURT
DATED OCTOBER 5, 1976 (SINGLE JUDGE)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HIJINIO SILVA, ET AL

V.

R. D. FITCH, ET AL

SA-76-CA-126

JUDGMENT

This action came on for consideration before the Court, and for the reasons set forth in the Order of the Three-Judge Court dated September 26, 1976, and the Order of this Court dated October 4, 1976,

It is hereby ORDERED, ADJUDGED and DECREED:

1. That the defendants, their agents, employees, successors in office, and all persons acting in concert or in participation with any of them be permanently enjoined from implementing any change in election precincts in Frio County, Texas, unless and until such redistricting is precleared according to the provisions of Section 5 of the Voting Rights Act of 1965;

2. That Frio County is to pay to the Mexican American Legal Defense and Education Fund for attorney's fees the sum of Six Thousand Dollars (\$6,000.00) as agreed in the May 31, 1976, settlement;

3. That Frio County is to pay to the Mexican American Legal Defense and Education Fund for attorney's fees the sum of Thirteen Thousand Seven Hundred Seventy-five Dollars (\$13,775.00) to reimburse it for the services of Joaquin C. Avila and Albert A. Kauffman from July 6, 1976, through October 1, 1976;

4. That Frio County is to pay Noel Perez for attorney's fees the sum of One Thousand One Hundred Fifty Dollars (1,150.00) to reimburse him for the services of Luis Segura from July 6, 1976, through October 1, 1976;

5. That Frio County is to pay Rudy Gonzales for attorney's fees the sum of Two Thousand Twenty-five Dollars (\$2,025.00) to reimburse him for the services of George Korbel from July 6, 1976, through October 1, 1976.

SIGNED this 5th day of October, 1976.

S/DARWIN W. SUTTLE
United States District Judge

APPENDIX B

ORDER AND FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF THE U.S.

DISTRICT COURT

DATED OCTOBER 4, 1976 (SINGLE JUDGE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HIJINIO SILVA, ET AL

V.

R. D. FITCH, ET AL

SA-76-CA-126

ORDER

On October 1, 1976, came on to be heard Plaintiffs' Motions asking the Court to award attorney's fees for their successful prosecution of this action. The Court, on the basis of stipulated facts, the evidence presented at a hearing before a Three Judge Court on September 2, 1976, and the evidence presented on October 1, 1976, enters the following findings of fact and conclusions of law:

Findings of Fact:

1. The August 16, 1973, Redistricting Plan (1973 Plan) changing the precinct voting boundaries in Frio County, Texas, was neither precleared by the Department of Justice nor precleared by a declaratory judgment of the District Court of the District of Columbia.

2. The Agreed Settlement of May 31, 1976, (1976 Plan) (entered by the Court *nunc pro tunc* June 28,

1976) changing the precinct voting boundaries in Frio County, Texas, was entered into by the Defendants voluntarily and not as the result of fraud or compulsion.

3. The 1976 Plan was precleared by the Department of Justice on August 24, 1976.

4. To conduct the September 4, 1976, election scheduled under the terms of the 1976 agreement, the parties have printed ballots, acquired polling places and made arrangements for the presence of election officials.

5. The Agreed Settlement of May 31, 1976, provided for attorney's fees of \$6,000.00 payable to MAL-DEF.

6. On July 6, 1976, the Defendants moved the Court to set aside the Agreed Settlement.

7. The attorneys for Plaintiff Hijinio Silva accumulated 275.5 billable hours from July 6, 1976, through October 1, 1976. The attorney for Noel Perez, realigned as Plaintiff on September 2, 1976, accumulated 23 billable hours from July 6, 1976, through October 1, 1976. The attorney for Rudy Gonzales, realigned as Plaintiff on September 2, 1976, accumulated 40.5 billable hours from July 6, 1976, through October 1, 1976.

8. A reasonable attorney's fee is \$50.00 per hour.
Conclusions of Law:

1. Jurisdiction is proper before a single Judge Court. (See Order of September 26, 1976.)

2. The Agreed Settlement of May 31, is a valid consent agreement and is to be enforced.

3. The 1976 Plan has been precleared according to § 5 of the Voting Rights Act (42 U.S.C. § 1973c).

4. An award of reasonable attorney's fees incurred from July 6, 1976, is proper in this cause. (42 U.S.C. § 19731 (e))

5. Frio County itself is solely liable for attorney's fees awarded, and that the named defendants are not liable individually for any part of this award.

The Court therefore ORDERS

1. That Frio County pay MALDEF the sum of \$6,000.00 as agreed in the May 31, 1976, settlement.

2. That Frio County pay to MALDEF the sum of \$13,775.00 to reimburse it for the services of Joaquin C. Avila and Albert A. Kauffman from July 6, 1976, through October 1, 1976.

3. That Frio County pay Noel Perez the sum of \$1,150.00 to reimburse him for the services of Luis Segura from July 6, 1976, through October 1, 1976.

4. That Frio County pay Rudy Gonzales the sum of \$2,025.00 to reimburse him for the services of George Korbel from July 6, 1976, through October 1, 1976.

ENTERED this 4th day of October, 1976.

S/DARWIN W. SUTTLE
United States District Judge

APPENDIX C

ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE U.S.

DISTRICT COURT

DATED SEPTEMBER 26, 1976 (THREE JUDGE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HIJINIO SILVA, ET AL

V.

R. D. FITCH, ET AL

SA-76-CA-126

ORDER

On September 2, 1976, came on to be heard Plaintiff's Motions asking the Court to enjoin permanently any election held under the Defendant's August 16, 1973, Redistricting Plan and to order the holding of elections scheduled under the terms of an agreed settlement between Plaintiffs and Defendants on May 31, 1976. The Court, on the basis of stipulated facts and the evidence presented, enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The August 16, 1973, Redistricting Plan (1973 Plan) changing the precinct voting boundaries in Frio County, Texas, was neither precleared by the Department of Justice nor precleared by a declaratory judgment of the District Court of the District of Columbia.

2. The Agreed Settlement of May 31, 1976, (1976

Plan) (entered by the Court *nunc pro tunc* June 28, 1976) changing the precinct voting boundaries in Frio County, Texas, was entered into by the Defendants voluntarily and not as the result of fraud or compulsion.

3. The 1976 Plan was precleared by the Department of Justice on August 24, 1976.

4. To conduct the September 4, 1976, election scheduled under the terms of the 1976 agreement, the parties have printed ballots, acquired polling places and made arrangements for the presence of election officials.

CONCLUSIONS OF LAW

1. Jurisdiction is proper before a three-judge Court. (42 U.S.C. § 1973c; 28 U.S.S. §§ 1343 (c), 2283)

2 The 1973 Plan is within the "coverage" of § 5 of the Voting Rights Act. (42 U.S.C. §§ 1973b (b), 1973c)

3. The 1976 Plan is a valid consent agreement.

4. The 1976 Plan has been precleared according to § 5 of the Voting Rights Act. (42 U.S.C. § 1973c)

The Court therefore ORDERS:

1. That the Defendants, their agents, employees, successors in office, and all persons acting in concert or in participation with any of them be permanently enjoined from implementing any change in election precincts in Frio County, Texas, unless and until such redistricting is precleared according to the provisions of S5 of the Voting Rights Act of 1965;

2. That the September 4, 1976, elections be held as scheduled;

3. That the three-judge Court is hereby dissolved and all remaining issues in this cause are remanded to the single-judge Court.

ENTERED this 20th day of September, 1976.

S/JOHN H. WOOD, JR.
United States Circuit Judge, Fifth Circuit

S/DARWIN W. SUTTLE
United States District Judge

S/THOMAS G. GEE
United States District Judge

APPENDIX D

ORDER VACATING JUDGMENT OF THE
U.S. DISTRICT COURT
DATED AUGUST 5, 1976 (THREE JUDGE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

HIJINIO SILVA, CARMELINA TREVINO,
ARNALDO HERNANDEZ, MODESTA SALAZAR,
and ANITA GARZA, Individually and on behalf
of All Others Similarly Situated,

vs.

R. D. FITCH, Individually and in His
Official Capacity as Frio County,
Texas, County Judge; WILLIAM A. BOYD,
JAMES C. STACY, and OWEN LESTER,
and NOEL PEREZ, Individually and in Their
Official Capacities as County Commissioners
of Frio County, Texas; MONA HOYLE,
Individually and in Her Official Capacity as
Frio County, Texas, County Clerk;
BENNY C. SANDERS, Individually and in
His Official Capacity as Sheriff of
Frio County, Texas; YANCEY BARNHART,
Individually and in His Official Capacity as
Democratic Party Chairman of Frio County,
Texas; RUDY GONZALES, Individually and
in His Official Capacity as Raza Unida Party
Chairman of Frio County, Texas; and
Frio County, Texas.

SA-76-CA-126

ORDER VACATING JUDGMENT

The motion of defendants, R. D. Fitch, William A. Boyd, James C. Stacy, Owen Lester, Mona Hoyle, Benny C. Sanders, and Yancey Barnhart, for an order vacating prior order or judgment coming on regularly to be heard, and it appearing that said judgment pur-

ports to be a consent judgment wherein in fact it was not agreed to by many of the defendants and is therefore void, IT IS THEREFORE:

ORDERED that the final order or judgement herein dated June 28, 1976, be vacated.

Dated at San Antonio, Texas, this 5th day of August 1976; at 3:00 o'clock P.M.

S/THOMAS G. GEE
United States Circuit Judge, Fifth Circuit

S/JOHN H. WOOD, JR.
United States District Judge, Fifth Circuit
Western District

S/DARWIN W. SUTTLE
United States District Judge
Western District

APPENDIX E

ORDER ["CONSENT" ORDER] OF THE
U.S. DISTRICT COURT
DATED JUNE 28, 1976 (THREE JUDGE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HIJINIO SILVA, CARMELINA TREVINO,
ARNALDO HERNANDEZ, MODESTA SALAZAR,
and ANITA GARZA, Individually and on behalf
of All Others Similarly Situated,

vs.

R. D. FITCH, Individually and in His
Official Capacity as Frio County,
Texas, County Judge; WILLIAM A. BOYD,
JAMES C. STACY, and OWEN LESTER,
and NOEL PEREZ, Individually and in Their
Official Capacities as County Commissioners
of Frio County, Texas; MONA HOYLE,
Individually and in Her Official Capacity as
Frio County, Texas, County Clerk;
BENNY C. SANDERS, Individually and in
His Official Capacity as Sheriff of
Frio County, Texas; YANCEY BARNHART,
Individually and in His Official Capacity as
Democratic Party Chairman of Frio County,
Texas; RUDY GONZALES, Individually and
in His Official Capacity as Raza Unida Party
Chairman of Frio County, Texas; and
Frio County, Texas.

SA-76-CA-126

ORDER

In this cause of action in which the Plaintiffs and Defendants have resolved the various claims presented by the Plaintiffs' complaint, the Court hereby makes the following findings and orders:

(1) That this Court has jurisdiction of this cause under 42 U.S.C. § 1343(3) and (4);

(2) That Frio County is a political subdivision subject to the provisions of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, et seq;

(3) That Plaintiffs sue individually and represent a class of Mexican Americans residing in Frio County, Texas;

(4) That the Defendants are sued in their individual and official capacities;

(5) That the Frio County, Texas, reapportionment plan of August, 1973, is an election practice or procedure, or standard or qualification for voting different from that in force on November 1, 1972. The reapportionment plan of August, 1973, was objected to by the U.S. Justice Department, pursuant to the Voting Rights Act of 1965, as amended;

(6) That the Plaintiffs timely filed this lawsuit on April 22, 1976, and are not guilty of any laches;

(7) That in Frio County, members of the County Commissioners Court, Justices of the Peace and Constables are all elected from identical election districts. Voting Precinct Chairmen are elected from voting precincts;

(8) That on May 31, 1976, Frio County submitted to the U.S. Department of Justice pursuant to the Voting Rights Act of 1965, as amended, a County Commissioner Court reapportionment plan which was

formulated after consultation with both the Plaintiffs and Defendants. On June 4, 1976, the U. S. Department of Justice pursuant to the Voting Rights Act of 1965, as amended, approved the May 31, 1976, Frio County Commissioners Court reapportionment plan;

(9) That Defendants will implement this May 31, 1976, reapportionment plan for newly scheduled primary elections, runoff primary elections, the general election in November, 1976, and similar county Commissioners may reapportion its commissioners' precincts;

(10) That since the primary and runoff primary elections were postponed by Order of this Court, pending approval by the U.S. Department of Justice, pursuant to the Voting Rights Act of 1965, as amended, new elections dates are necessary to conduct these elections for the year 1976. Both parties agree and the Court hereby orders that the following election schedule to be applicable to and effective only for the qualification and nomination for the 1976 election year for the primary elections of candidates for membership on the Frio County Commissioners Court and the positions of Constable, Justices of the Peace and Voting Precinct Chairmen:

- a. The opening of the period for candidate qualification shall be at 8:00 A.M. on the 28th day of June, 1976.
- b. The deadline for candidate qualification and filing shall be at 6:00 P.M. on the 19th day of July, 1976.
- c. The period for the request to vote absentee by mail for the first primary shall begin at 8:00

A.M. on the 6th day of July, 1976, and end on the 31st day of August, 1976, at 5:00 P.M. To be counted, such ballot must be received not later than 10:00 A.M. on the 2nd day of September, 1976.

- d. The period of absentee voting by personal appearance shall begin at 8:00 A.M. on the 16th day of August, 1976, and close on the 31st day of August, 1976, at 5:00 P.M.
- e. The first primary election shall be held on the 4th day of September, 1976, from 7:00 A.M. to 7:00 P.M.
- f. The period for the request to vote absentee by mail for the second primary shall begin at 8:00 A.M. on the 5th day of September, 1976, and end on the 28th day of September, 1976, at 5:00 P.M. To be counted, such ballot must be received not later than 10:00 A.M. on the 30th day of September, 1976.
- g. The period of absentee voting by personal appearance for the second primary shall begin at 8:00 A.M. on the 13th day of September, 1976, and shall close at 5:00 p.m. on the 28th day of September, 1976.
- h. The second or runoff primary, if necessary, shall be held on the 2nd day of October, 1976, from 7:00 A.M. to 7:00 P.M.

(11) That for the election year of 1976, the statutory residency requirement shall be suspended for the positions of Frio County Commissioners, Constables, Justices of the Peace, and Voting Precinct Chairmen, provided, however, that a candidate must

have been a resident of that particular county commissioner or voting precinct as delineated by the agreed reapportionment plan, since January 19, 1976.

(12) That all persons including those who have already filed as candidates for membership on the Frio County Commissioners Court, for the positions of Constable or for the positions of Justice of the Peace or Voting Precinct Chairmen shall be required to file for office within the time and under the terms of this Order in order to be eligible for nomination by primary election for membership on the Frio County Commissioners Court or the positions of Constable, Justice of the Peace, or voting Precinct Chairmen. Provided specifically, however, that candidates who have paid filing fees or filed petitions for nomination or have been exempted therefrom by judicial order shall not be required to pay an additional fee or file a new petition for nomination.

(13) That the persons who are, in fact, nominated by primary elections held under the provisions of this Order be certified as candidates for election in the regular general election to be held in November of 1976.

(14) That the Defendants are hereby ordered to act immediately to create new election precincts to comply with the Voting Rights Act of 1965, as amended. Upon approval by the U.S. Department of Justice, pursuant to the Voting Rights Act of 1965, as amended, such election precincts shall be in effect for the primary, runoff primaries, and general election scheduled for the year 1976 and hereafter, until changed in accordance with law.

(15) That the Defendants pay the Plaintiffs' attorneys an amount totalling \$6,000 (six thousand dollars and no cents) for reasonable attorneys fees and costs incurred in this cause of action.

(16) That the primary and runoff primary elections scheduled by this Order shall be financed by the State of Texas from the same appropriations from which other 1976 party primary elections were funded.

(17) This Order shall constitute the final judgment in this cause of action.

SIGNED and ENTERED at San Antonio, Texas, this 28 day of June, at 4:30 o'clock, p.m.

S/THOMAS G. GEE
United States Circuit Judge
Fifth Circuit

S/JOHN H. WOOD, JR.
United States District Judge
Western District

S/DARWIN W. SUTTLE
United States District Judge
Western District

SIGNED by U. S. District
Judge Darwin W. Suttle
on the 14th day of July, 1976

APPROVED AS TO FORM:

JOAQUIN G. AVILA
Attorney For Plaintiff

CRAIG L. AUSTIN
Attorney For Defendant

APPENDIX F

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HIJINIO SILVA, CARMELINA TREVINO,
ARNALDO HERNANDEZ, MODESTA SALAZAR,
and ANITA GARZA, Individually and on behalf
of All Others Similarly Situated,

vs.

R. D. FITCH, Individually and in His
Official Capacity as Frio County,
Texas, County Judge; WILLIAM A. BOYD,
JAMES C. STACY, and OWEN LESTER,
and NOEL PEREZ, Individually and in Their
Official Capacities as County Commissioners
of Frio County, Texas; MONA HOYLE,
Individually and in Her Official Capacity as
Frio County, Texas, County Clerk;
BENNY C. SANDERS, Individually and in
His Official Capacity as Sheriff of
Frio County, Texas; YANCEY BARNHART,
Individually and in His Official Capacity as
Democratic Party Chairman of Frio County,
Texas; RUDY GONZALES, Individually and
in His Official Capacity as Raza Unida Party
Chairman of Frio County, Texas; and
FRIO COUNTY, TEXAS,

SA-76-CA-126

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that R. D. FITCH, Individ-
ually and in his official capacity as Frio County, Texas
County Judge; WILLIAM A. BOYD, JAMES C.

STACY, and OWEN LESTER, Individually and in
their official capacities as County Commissioners of
Frio County, Texas; MONA HOYLE, Individually
and in her official capacity as Frio County, Texas,
Clerk; BENNY C. SANDERS, Individually and in his
official capacity as Sheriff of Frio County, Texas;
YANCEY BARNHART, Individually and in his offi-
cial capacity as Democratic Party Chairman of Frio
County, Texas, and FRIO COUNTY, TEXAS, the
defendants above-named, hereby appeal to the Su-
preme Court of the United States from the final Judg-
ment of October 5, 1976 and the Orders of October 4,
1976, September 26, 1976 and June 28, 1976 to which it
pertains adjudging that, "The 1976 Plan is a valid
consent agreement" (as embodied in the Order of June
28, 1976) and the permanent injunction and award of
attorney fees adjudged as dependent thereon.

This appeal is taken pursuant to Title 28, United
States Code, Section 1253 and 42 USCS 1973b.

Dated October 22, 1976.

JAMES WARREN SMITH, JR.
County Attorney
Frio County, Texas
P. O. Box V
Pearsall, Texas 78061

HARVEY L. HARDY
1600 N.E. Loop 410, Suite 130
San Antonio, Texas 78209

Attorneys For Defendants
FRIO COUNTY, R. D. FITCH, WILLIAM A. BOYD,
JAMES C. STACY, OWEN LESTER, MONA HOYLE,
BENNY C. SANDERS, and YANCEY BARNHART

S/HARVEY L. HARDY

By: _____
HARVEY L. HARDY

CERTIFICATE OF SERVICE

I, Harvey L. Hardy, a member of the Bar of the Supreme Court of the United States and counsel of record for Frio County, R. D. Fitch, William A. Boyd, James C. Stacy, Owen Lester, Mona Hoyle, Benny C. Sanders, and Yancey Barnhart, appellants herein, hereby certify that on October 22, 1976, pursuant to Rule 33, Rules of the Supreme Court, I served a copy each of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties herein, as follows:

On Hijinio Silva, Carmelina Trevino, Arnaldo Hernandez, Modesta Salazar, Anita Garza, Rudy Gonzales, and Noel Perez, appellees herein, by depositing such copies in the United States Post Office, San Antonio, Texas, with first class postage prepaid, properly addressed to the post office address of Albert H. Kauffman, the above named Hijino Silva, Carmelina Trevino, Arnaldo Hernandez, Modesta Salazar and Anita Garza's counsel of record, at 501 Petroleum Commerce Building, 201 N. St. Mary's Street, San Antonio, Texas 78205, and to Mr. Luis M. Segura, the above named Noel Perez's counsel of record, at 523 South Main, San Antonio, Texas, and to Mr. George J. Korbel, the above named Rudy Gonzales' counsel of record, at Apt. 1801, 7200 S. Presa, San Antonio, Texas

All parties required to be served have been served.

Dated this 22nd day of October, 1976.

HARVEY L. HARDY

HARVEY L. HARDY
1600 N.E. Loop 410
Suite 130

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SPECIAL APPENDIX

PAGE REFERENCES TO KEY TESTIMONY GIVEN AT THREE JUDGE COURT HEARING OF SEPTEMBER 2, 1976

Page References To Key Testimony Given At
Three Judge Court Hearing of September 2, 1976

(Page Numbers are those of Court Reporter's
typewritten Transcript)

1. Pages 10-11 & 18—Attorney Austin testified as to his representations pertaining to no reappor-tionment until 1981.
2. Page 14 — Austin testified that he was hired to represent Frio County and not others. Lines 19, 22, 23.
3. Page 16 — Austin testified that Sheriff Sanders and County Chairman Yancey were not present when the settlement was voted. Line 7.
4. Page 22 — Austin testified defendant Gonzales "defaulted". Line 13.
5. Page 23 — Austin testified he did not submit the consent order to the defendants and get their concurrence. Line 21.
6. Page 26 — Austin admits he made misstatements in writing in re the **Beer** case. Lines 18, 21.
7. Pages 31-32 — Commissioner Boyd testified he

—31—

agreed to order only because of representation re no reapportionment until 1981.

8. Pages 36-37 — Commissioner Lester testified he abstained. Corroborates testimony in re 1981 date.
9. Pages 40-41 — County Judge Fitch testified he agreed to order only because of 1981 representation.
10. Page 46 — Commissioner Stacy verifies that Attorney Austin made the 1981 representation to the members of the Commissioners' Court.
11. Page 49 — County Clerk Hoyle verifies that Attorney Austin made the 1981 representation to the Commissioners' Court.
12. Pages 55-59 — Tax Assessor-Collector Nations begins to testify and his affidavit that three out of four commissioner precincts under the 1973 plan had a majority of registered voters of Mexican ancestry is received in evidence and stipulated to by all attorneys as what his testimony to such effect would have been.